

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CLAUDINE OSGOOD, an individual
ANTON EWING, an individual,

Plaintiff,

v.

Main Streat Marketing, LLC, a Utah
limited liability company; Jerrod Robker,
an individual aka Jerrod McAllister;
DOES 1-100; ABC CORPORATIONS 1-
100; XYZ, LLC's 1-100,

Defendants.

Case No.: 16CV2415 GPC BGS

**ORDER DENYING PLAINTIFFS'
RENEWED MOTION FOR
DEFAULT JUDGMENT**

[Dkt. No. 77]

Before the Court is Plaintiffs Anton Ewing and Claudine Osgood's final renewed motion for default judgment pursuant to Federal Rule of Civil Procedure ("Rule") 55(b). (Dkt. No. 77.) No opposition has been filed. Based on the reasoning below, the Court **DENIES** Plaintiffs' final renewed motion for default judgment pursuant to Rule 55(b).

I. Background

On January 17, 2017, Plaintiffs Anton Ewing and Claudine Osgood, proceeding *pro se*, filed the operative second amended complaint ("SAC") asserting two causes of

1 action for violations of California Invasion of Privacy Act (“CIPA”), Cal. Penal Code
2 sections 632.7 and 637.2(a)-(b) and the Telephone Consumer Protection Act (“TCPA”),
3 47 U.S.C. § 227, against Defendants Main Streat Marketing, LLC and Jerrod Robker aka
4 Jerrod McAllister (“McAllister”) (collectively “Defendants”). (Dkt. No. 36.) Defendants
5 with counsel, filed an answer on January 31, 2017. (Dkt. No. 37.) On March 27, 2017,
6 the Court granted defense counsel’s motion to withdraw as counsel. (Dkt. No. 51.) The
7 Court allowed Main Streat Marketing, LLP 30 days to obtain substitute counsel and noted
8 that if it failed to obtain new counsel, it may be subject to default proceedings. *Id.* at 3.
9 The Court also directed McAllister to notify the Court of his current mailing address
10 within 30 days. *Id.* To date, both Defendants have failed to respond.

11 After the Court granted Plaintiff Ewing’s motion to strike Answer and granted
12 Plaintiffs Ewing and Osgood’s motion for entry of default, the Clerk of Court entered
13 default on July 28, 2017. (Dkt. Nos. 67, 69.) On August 9, 2017, Plaintiffs filed a joint
14 motion for default judgment. (Dkt. No. 70.) Defendants did not file an opposition. On
15 September 27, 2017, the Court denied Plaintiffs’ motion for default judgment because
16 Plaintiffs failed to conduct an analysis on whether default judgment is appropriate under
17 the factors laid out in *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986) and failed
18 to provide proof or evidence to support their proposed damages of \$1,000,000. (Dkt. No.
19 72 at 3¹.) On December 29, 2017, Plaintiffs filed another motion for default judgment.
20 (Dkt. No. 73.) Defendants did not oppose. While the Court found that the Eitel factors
21 were met to warrant default judgment, the Court denied the motion because Plaintiffs
22 “failed to provide any factual or legal support for their requested damages of
23 \$1,000,000.” (Dkt. No. 76 at 10). The Court granted Plaintiffs leave to file a final
24 renewed motion for default judgment for purposes of demonstrating damages. (*Id.*) On
25

26 ¹ Page numbers are based on the CM/ECF pagination.

1 April 9, 2018, Plaintiffs filed a final renewed motion for default judgment. (Dkt. No. 77.)
2 Again, Defendants did not file an opposition.

3 **II. Discussion**

4 **A. Motion for Default Judgment**

5 In the Court's prior order filed on March 21, 2018, the Court granted Plaintiffs a
6 final opportunity to demonstrate the amount of damages they seek under the TCPA and
7 CIPA.

8 Upon default, the factual allegations in the complaint are taken as true, except
9 those related to the amount of damages. *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560
10 (9th Cir. 1977); *see* Fed. R. Civ. P. 8(b)(6). Allegations of damages must be proven. *See*
11 *Geddes*, 559 F.2d at 560. "The plaintiff is required to provide evidence of its damages,
12 and the damages sought must not be different in kind or amount from those set forth in
13 the complaint." *Amini Innovation Corp. v. KTY Int'l. Mktg.*, 768 F. Supp. 2d 1049, 1054
14 (C.D. Cal. 2011) (citing *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D.
15 494, 498 (C.D. Cal. 2003)). When "proving-up" damages, admissible evidence
16 supporting damage calculations is required. *Id.* Should default be entered, it is within the
17 province of the court's power to use evidence or facts from the record to fix the amount
18 which the plaintiff is lawfully entitled to recover and give judgment accordingly. *Pope v.*
19 *United States*, 323 U.S. 1, 12 (1944). In determining damages in a TCPA case, "the
20 numbers from which the calls were made . . . are significant because they establish
21 Plaintiff had some basis for concluding that the calls were from Defendant or an agent of
22 Defendant." *Heidorn v. BBD Mktg. & Mgmt. Co., LLC*, No. C-13-00229 JCS, 2013 WL
23 6571629, at *15 (N.D. Cal. Aug. 19, 2013) (denying statutory damages based on calls
24 alleged in the complaint as Plaintiff did not provide the date or time of the calls or the
25 numbers from which the calls were made).

1 In their renewed motion, Plaintiffs seek damages in the amount of \$96,000 for
2 violations of the TCPA and CIPA. (Dkt. No. 77 at 4.)

3 The TCPA imposes a statutory penalty of \$500 per violation and gives the court
4 discretion to award up to three times that amount for knowing or willful violations. 47
5 U.S.C. §§ 227(b)(3), (c)(5). Effective January 1, 2017, CIPA provides a civil penalty of
6 the greater of “\$5,000 per violation” or “[t]hree times the actual amount of damages, if
7 any.” Cal. Penal Code § 637.2(a). Prior to the amendment, CIPA provided a civil
8 penalty of the greater of “\$5,000” or “three times the amount of actual damages, if any.”
9 Cal. Penal Code § 637.2(a) (2016) (amended Jan. 1, 2017).²

10 After a review of Plaintiffs’ supporting documentation, the Court concludes they
11 have failed to demonstrate that they are entitled to \$96,000. Plaintiff Ewing filed a
12 declaration stating that Defendants called him five times on May 3, 2016, two times on
13 June 10, 2016, and one time on June 12, 2016. (Dkt. No. 77-2, Ewing Decl. ¶ 3.)
14 Attached to his declaration is his personal cell phone logs with a list of incoming and
15 outgoing calls between April 29, 2016 and May 3, 2016. (*Id.*, Ewing Decl., Ex.
16 B.) However, Ewing’s declaration fails to list the telephone numbers belonging to
17 Defendants. As such, even though Plaintiff Ewing alleges that he was called five times
18 on May 3, 2016, the Court cannot verify that it was Defendants who actually made the
19 calls. Plaintiff Ewing also mentions two calls on June 10, 2016 and another on June 12,
20 2016, but the phone records provided in Exhibit B do not cover these dates. Ewing’s
21 declaration is not sufficient to establish any calls were made by Defendants to his cellular
22

23 ² Plaintiffs appear to calculate damages based on the amended section 637.2 which was effective
24 January 1, 2017 providing “\$5,000 per violation” without explaining whether the amended statute can be
25 applied retroactively to telephone calls made by Defendants in 2016. In light of the Court’s ruling
26 granting them leave to file another renewed motion for default judgment, Plaintiffs are directed to
27 address whether the amended Cal. Penal Code section 637.2 applies retroactively to this case.
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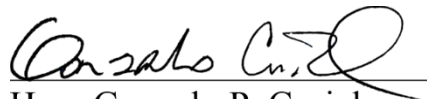
1 telephone. Next, Plaintiff Osgood states she was called on August 11, 12, 16, and 18,
 2 2016 from the phone number 626-472-1821 and 626-498-2252, (Dkt. No. 77-3, Osgood
 3 Decl.), but fails to provide any phone records to support her claim that Defendants called
 4 her four times.³ Thus, the Court is unable to accurately address the question of how
 5 many violations of the TCPA Plaintiff has established, much less whether Plaintiff is able
 6 to claim additional treble damages. Therefore, the Court DENIES Plaintiffs' renewed
 7 motion for default judgment.⁴

8 **III. Conclusion**

9 Based on the above, the Court DENIES Plaintiffs' renewed motion for default
 10 judgment. In the prior order, the Court admonished Plaintiffs that if they failed to cure
 11 the deficiencies in their motion, it may result in denial of the motion and dismissal of the
 12 case for lack of prosecution. (Dkt. No. 76 at 10.) However, since Plaintiffs, proceeding
 13 pro se, have made an effort to demonstrate damages, the Court grants Plaintiffs leave to
 14 file one final renewed motion for default judgment within 20 days of the filed date of this
 15 Order. The hearing date set for June 15, 2018 shall be **vacated.**

16 IT IS SO ORDERED.

17 Dated: June 7, 2018

18 
 19 Hon. Gonzalo P. Curiel
 20 United States District Judge
 21

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 ³ The Court notes that it checked whether the numbers Osgood provided for Defendants matched any of
 23 the incoming calls from Ewing's limited phone records but those telephone numbers were not listed in
 24 Ewing's phone records.

25 ⁴ The Court also questions the calculation of damages propounded by Plaintiffs. See Drew v. Lexington
 26 Consumer Advocacy, LLC, Case No. 16cv0200-LB, 2016 WL 1559717, at *11-12 (N.D. Cal. Apr. 18,
 2016) (noting three factor test when considering TCPA damages). However, the Court need not address
 the specific calculations as Plaintiffs have failed to establish Defendants called them.